Nos. 85-1658 and 85-1660

In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Appellants
v.
FLORIDA POWER CORPORATION, *et al.*
Appellees

GROUP W CABLE, INC., *et al.*,
Appellants
v.
FLORIDA POWER CORPORATION, *et al.*
Appellees

On Appeals from the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC NORTHWEST BELL TELEPHONE COMPANY IN SUPPORT OF APPELLEES

L. ANDREW TOLLIN *
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141

DANA A. RASMUSSEN
ROBERT B. MCKENNA
BRUCE K. POSEY
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 429-0303

Attorneys for
The Mountain States Telephone and Telegraph Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company

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* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICI CURIAE

Amici curiae, The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company ("MTN, NWB and PNB") are telephone companies divested from the American Telephone and Telegraph Company pursuant to the consent decree entered in *United States v. American Telephone and Telegraph Co.*[1] Collectively,

[1] 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Their stock is owned by U S West, Inc., a publicly-traded holding company.

MTN, NWB and PNB provide telephone exchange and related services in an area which covers approximately 40 percent of the continental United States.

MTN, NWB and PNB own and use, both solely and in conjunction with local power companies and municipalities, poles and underground conduits for the placement of telephone and power lines. Because MTN, NWB and PNB are certificated common carriers under the laws of the states in which they do business, they are authorized to place their poles and conduits (and associated wires) on streets and public rights-of-way obtained from the appropriate local municipalities.[2] Poles are also located on easements of MTN, NWB and PNB (and wires are buried—that is, without a "conduit"—along similar easements), as well as on property owned in fee by the companies. When MTN, NWB and PNB share space on a pole owned by another utility, they pay a rate for such space which generally approximates its "market" value.

A telephone company generally receives the authority to construct its privately owned poles and conduits within the public right-of-way in exchange for its duty, as a common carrier, to provide telecommunications service to the public on a non-discriminatory basis. These common carrier services are often subject to rate regulation by the Federal Communications Commission ("FCC") or, where appropriate, state regulatory agencies. However, this common carrier duty to serve entails the transmission of information on behalf of customers; there is no common carrier service obligation to provide access to telephone poles and conduits themselves—as these facilities remain private property.

Cable television ("CATV") companies, because they also utilize wire for distribution of services, can obtain

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[2] Throughout this brief, MTN, NWB and PNB utilize the term "pole" to refer to both poles and conduits.

a significant economic benefit if they use pre-existing poles and conduits, rather than constructing their own. CATV companies currently make use of the poles owned by MTN, NWB and PNB on a "space available" basis, subject to state regulation or, where the state does not provide the "certification" demanded by the statute at issue herein (the "Pole Attachment Act"), subject to the FCC's rules under the Act.[3] The rates which CATV companies pay MTN, NWB and PNB for use of telephone company poles and conduits (under the Pole Attachment Act or applicable state rules—where appropriate) are typically lower than the rates which MTN, NWB and PNB pay or receive for similar pole space in other contexts.

Unlike MTN, NWB and PNB, CATV companies do not offer common carrier services to the public. To the contrary, they generally control the information content of their transmissions and in such event are not regu-

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[3] Communications Act Amendments of 1978 ("Pole Attachment Act"), 47 U.S.C. § 224 (1978). The Pole Attachment Act was amended in 1983. The amended version of the Act is not at issue in this proceeding. Because the interstate common carrier telecommunications services offered by MTN, NWB and PNB are subject to regulation by the FCC under Title II of the Communications Act, 47 U.S.C. § 201, *et seq.*, the FCC's jurisdiction over MTN, NWB and PNB does not depend upon the Pole Attachment Act (unlike Florida Power which, as an electric utility, is not otherwise subject to FCC jurisdiction). In fact, although never reviewed by this Court, the FCC's authority to regulate certain aspects of the pole attachment practices of telephone companies where there was a legally supportable finding of a potential for "abuse of monopoly power" has been affirmed by the Court of Appeals for the Fifth Circuit on one occasion. *See General Telephone Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971), in which the Fifth Circuit sustained the FCC's conditioning of CATV related interstate carrier authorizations upon grants by telephone companies of certain pole attachment rights to competing CATV companies.

lated as common carriers.[4] In this regard, CATV service is offered pursuant to a local franchise,[5] and is subject to state and federal regulation.[6] Generally speaking, only one CATV company provides service in any one location.[7]

In this case Florida Power had entered into several contracts with three CATV companies for pole space, and the CATV companies subsequently complained to the FCC that the rates they had agreed to pay were too high. The FCC, finding jurisdiction under the Pole Attachment Act, agreed and ordered that the contract rates should be reduced by approximately seventy percent. The United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), based in part upon a finding that Florida Power, under FCC practice, could not realistically effectuate a removal of the CATV wires from its privately owned poles, held that a "taking" of Florida Power's property had occurred.[8] Predicated upon this finding of

[4] *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). Some CATV companies do provide services which are the equivalent of common carrier telephone services. *See Cox Cable Communications, Inc.*, 102 F.C.C.2d 110, 121 (1985).

[5] The franchise process itself is under attack by various CATV companies. *See City of Los Angeles v. Preferred Communications, Inc.*, —— U.S. ——, 106 S. Ct. 2034 (1986).

[6] *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The authority which state and federal regulators exercise over CATV companies is, however, limited. *See FCC v. Midwest Video Corp., supra* (federal common carrier rules); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 2889 (1986) ("must carry" rules); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) ("indecent" CATV programming); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (same).

[7] *See City of Los Angeles v. Preferred Communications, Inc., supra.*

[8] *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1539 (11th Cir. 1985) ("*Florida Power Corp.*"). This decision tracked the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*").

a "taking", the Eleventh Circuit also found that the procedure utilized by the FCC to set "just compensation" for this taking did not pass constitutional muster under the Fifth Amendment to the Constitution.[9]

Two separate groups of appellants noticed appeals of the Eleventh Circuit decision.[10] Both appellants predicate their appeals on the assertion that the Eleventh Circuit completely negated the Pole Attachment Act on constitutional grounds. Arguing from this premise, appellants further set forth theories of utility regulation which would, if accepted, dramatically reduce the ability of companies which provide utility services to maintain their private property free from governmental taking. As companies which provide common carrier telecommunications services and which own telephone poles and conduit facilities, MTN, NWB and PNB's interests are affected by the outcome of this case. In this brief, *Amici Curiae* make essentially two arguments:

1) The constitutional issues raised by appellants are not properly before this Court given the context of the instant proceeding; and

2) There is no basis for acceptance of appellants' position that the private property of public utilities is not afforded full Fifth Amendment protection against uncompensated governmental takings.

SUMMARY OF ARGUMENT

The primary thrust and focus of appellants' arguments in this case are predicated on the assertion that the Eleventh Circuit invalidated the Pole Attachment Act on constitutional grounds. While the Eleventh Circuit did find that the FCC's specific action with respect to Florida

[9] *See Florida Power Corp.*, 772 F.2d at 1544-46.

[10] Appellants FCC and United States of America are referred to herein as "FCC." Appellants Group W Cable, Inc., Cox Cablevision Corporation and National Cable Television Association, Inc. are referred to as "Group W."

Power's private property constituted a constitutional "taking" of that property, the Eleventh Circuit decision was directed at the FCC's conduct, not the Act itself. In fact, all parties are in agreement that the Pole Attachment Act does not authorize the FCC to "take" space on Florida Power's privately owned poles. Thus, review of the Eleventh Circuit's finding that the FCC unlawfully "took" Florida Power's private property should not involve the constitutionality of the Pole Attachment Act. Because the jurisdiction allotted to the FCC under the Act is extremely narrow, the substantial FCC interference with Florida Power's private property found by the Eleventh Circuit was in excess of the FCC's lawful authority. Therefore, the Eleventh Circuit's decision can be affirmed without reaching the constitutional issues raised by the FCC and Group W.

On the merits, both appellants rely upon the erroneous assertion that the private property of companies which provide utility service is entitled to only diminished protection against governmental takings. This argument fails to recognize the fundamental difference between the services which utilities provide—which may be properly subject to rate regulation by the proper governmental authority—and the private property of such a utility—which enjoys full Fifth Amendment protection to the same extent as that of any other entity. The Eleventh Circuit properly found that the authority of the FCC to regulate utility service did not include, and could not include consistent with the Fifth Amendment, the right to take utility property without application of the full panoply of protections mandated by the Constitution.

ARGUMENT

I. THE BROAD CONSTITUTIONAL ISSUES RAISED BY APPELLANTS ARE BASED UPON THE ERRONEOUS ASSERTION THAT THE ELEVENTH CIRCUIT INVALIDATED THE POLE ATTACHMENT ACT ON CONSTITUTIONAL GROUNDS

Both appellants assert that the Eleventh Circuit invalidated the Pole Attachment Act on constitutional grounds. However, we read the Eleventh Circuit decision much more narrowly—it merely invalidated several specific actions of the FCC on constitutional grounds. The Eleventh Circuit found that the FCC's actions with respect to specific contracts between Florida Power and three CATV companies amounted to a "taking" of Florida Power's private property. Based upon this "taking" conclusion, the Eleventh Circuit further found that the procedure for establishing rates set forth in the Pole Attachment Act did not comport with the constitutional "just compensation" requirements which apply whenever the government "takes" private property.

In their briefs, however, appellants concede that the Pole Attachment Act is a very narrow statute which vests limited authority in the FCC and does not authorize the FCC to "take" space on privately owned utility poles. MTN, NWB and PNB further submit that the Act does not authorize the FCC to interfere with a utility's exercise of domain over its private property in the manner declared unlawful by the Eleventh Circuit. Therefore, the lawfulness or unlawfulness of the FCC's actions with respect to Florida Power's property are not dependent upon whether or not the Pole Attachment Act is constitutional. To the contrary, it is the FCC's actions under the guise of the Pole Attachment Act which are properly before this Court, not the validity of the statute itself. Put simply, the threshold issue before this Court is whether the FCC actions which form the factual predicate for the Eleventh Circuit's taking finding are within the narrow delegation of authority contemplated by the Act.

The Constitutional issues raised by appellants are significant and involve complex questions regarding the interplay between constitutional property protections and government regulations. Because of the manner in which this case has reached the Court, however, these issues need not be decided here. Accordingly, we submit that the Eleventh Circuit's decision can be affirmed without reaching the constitutional questions raised by Appellants.

A. The Eleventh Circuit's Decision That The FCC's Actions Effectuated A Taking Was Not Based Upon An Invalidation Of The Pole Attachment Act

Both appellants assert that the Eleventh Circuit's decision invalidated the Pole Attachment Act *per se*. Thus, the FCC frames the essential question as:

> [w]hether the Pole Attachment Act of 1978 . . . effects a taking under the Fifth Amendment.[11]

Group W goes further, stating the issue as:

> [w]hether pole attachment rate regulation constitute[s] a taking *per se* as government compelled permanent physical occupation . . . .[12]

Group W even implies that acceptance of the Eleventh Circuit's analysis would result in a situation where "utility regulation would raise a constitutional issue at every turn." [13]

The Eleventh Circuit decision, however, was based on the manner in which the FCC had implemented the Act, and it was this specific FCC action, not the Act itself, which resulted in the Eleventh Circuit's finding that the agency had become involved in a taking. Specifically, the Eleventh Circuit concluded that:

> [T]he [FCC] *Order*, which [1] mandates a rental rate of less than one-third the agreed upon rates and

[11] FCC Brief at i.

[12] Group W Brief at i.

[13] *Id.* at 24.

> [2] which in reality precludes Florida Power from excluding the cable companies under any circumstances, amounts to a taking of private property for which just compensation is due under the Takings Clause of the Fifth Amendment.[14]
>
> * * * *
>
> [W]e hold that the *FCC's Order* effected a taking.[15]

The Court added that:

> Once there has been a taking, the determination of just compensation is a judicial, and not an administrative function. Because the Act does not properly allow for a judicial determination of just compensation, it is in our opinion, unconstitutional.[16]

The Eleventh Circuit's taking finding was predicated upon the FCC's invalidation of lawful contracts between Florida Power and three CATV companies upon complaint by the CATV companies that the rates they had agreed to pay were too high.[17] The Court found that the FCC mandated a rate of less than one third of the agreed upon rate.[18] More significantly, the Eleventh Circuit found that the FCC had, as part of its mandated reduction in these contract rates, materially interfered with Florida Power's ability to evict the CATV companies from its privately owned utility poles (and, in fact, had effectively made it impossible for Florida Power to do so).[19] This latter finding was predicated on two more general findings which neither appellant contests: 1) that the FCC had, through a uniform pattern of conduct, repeatedly voided attempts by utility pole owners

[14] *Florida Power Corp.*, 772 F.2d at 1539 (emphasis added).

[15] *Id.* at 1544 (emphasis added).

[16] *Id.* at 1539.

[17] *See id.* at 1539, 1543.

[18] *See id.* at 1541.

[19] *See id.* at 1543.

to evict CATV operators;[20] and 2) that the FCC had adopted a regulation that utility pole owners could not evict CATV operators "in order to avoid . . . Commission jurisdiction."[21] Under these circumstances, the Eleventh Circuit reached the unsurprising conclusion that the FCC's actions amounted to a taking of Florida Power's property.[22] Nowhere did the Eleventh Circuit find that this taking was mandated (or even contemplated) by the Pole Attachment Act.

Both appellants go to great lengths to point out that the Pole Attachment Act is very narrow, and does not purport to grant the FCC plenary authority over privately owned utility poles. The FCC argues that the Pole Attachment Act does *not* grant the FCC "general rate-making authority;"[23] that it does not vest CATV companies with a "right to attach anything" to utility poles;[24] and that the Act does not vest the FCC with the power to materially interfere with the ability of the utility to require CATV companies to vacate their poles.[25] In fact, the FCC sets forth the proposition that the Pole Attachment Act is nothing more than a dispute resolution mechanism which applies "only when the parties themselves are unable to reach a mutually satisfactory arrangement;"[26] an anomaly, given the fact that the FCC voided an otherwise lawful contract. In short, the FCC's position is that its authority under the Pole Attachment Act is "temporary" and "limited."[27]

We submit that the FCC's and Group W's assertions of the limited nature of the Pole Attachment Act are correct. For example, it is clear that Congress did not intend the Pole Attachment Act to vest the FCC with general regulatory authority over pole attachments;[28] did not grant CATV companies "a guarantee of access . . . to utility poles;"[29] and was meant to be only a temporary "flexible program . . . [t]o assist parties in their private resolution of CATV pole attachment disputes."[30] In fact, the legislative history of the Act reflects that the FCC was not authorized to assert "taking" jurisdiction under the Pole Attachment Act, stating that the "exercise of rights of eminent domain . . . are beyond the scope of FCC CATV pole attachment jurisdiction."[31] What is more,

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[20] *See id.* at 1543-44.

[21] *See id.* at 1544. While asserting that no "taking" occurred under the facts here, the FCC in its brief admits that a "utility's power to terminate an agreement is unclear under the Act, and the Commission has not attempted to define the limits of that power." FCC Brief at 16-17.

[22] *See Florida Power Corp.*, 772 F.2d at 1544.

[23] FCC Brief at 12.

[24] FCC Brief at 14; *cf.* Group W Brief at 12, n.34.

[25] FCC Brief at 18-19. Group W concedes that CATV companies receive "at best, a revocable license" under the Pole Attachment Act, Group W Brief, p. 25, and states that "[u]nlike the statutory scheme addressed in *Loretto*, . . . Florida Power continues to control the use of its property, and may repossess and occupy space used by a cable operator any time that space is needed for utility service." Group W Brief at 26.

[26] FCC Brief at 5. This position is consistent with the FCC's claim that the Pole Attachment Act does not apply at all unless the utility has first reached a voluntary agreement with a CATV company. FCC Brief at 5.

[27] FCC Brief at 5.

[28] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. 15 (1977), *reprinted in* 2 U.S. Code Cong. & Ad. News 109, 123 (1978) ("Senate Report") (The Act "stops short of declaring the provision of pole space to [cable operators] 'wire or radio communications' per se, or that poles constitute 'instrumentalities, facilities, apparatus', et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. 153(a). . . . This expansion of FCC regulatory authority is strictly circumscribed.").

[29] *See* Senate Report at 16. 2 U.S. Code Cong. & Ad. News at 124.

[30] *See* Senate Report at 22. 2 U.S. Code Cong. & Ad. News at 130.

[31] *See* Senate Report at 16. 2 U.S. Code Cong. & Ad. News at 124.

even were the history of this statute less clear, "taking" authority, in order to be valid, must be expressly conferred by statute.[32]

The very narrow jurisdiction conferred by the Pole Attachment Act contrasts with the broad-sweeping governmental interference with Florida Power's private property rights reversed by the Eleventh Circuit. The fact that the conduct described by the Eleventh Circuit exceeded the FCC's statutory mandate merely emphasizes that the Eleventh Circuit's threshold "taking" finding did not implicate the constitutionality of the Pole Attachment Act itself. We submit that, at the very most, the Eleventh Circuit found that the FCC's actions at issue here constituted a "taking" of Florida Power's property—the Eleventh Circuit did not invalidate the Act itself or rule that the Act mandated or even permitted such a taking.

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[32] *Hooe v. United States*, 218 U.S. 322, 336, 31 S. Ct. 85, 89 (1910). *See also Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 706 F.2d 1312 (4th Cir.), *cert. denied*, 464 U.S. 893 (1983). As noted by the Ninth Circuit in addressing the difference between regulatory and taking power:

> [The agency] was given only the power to regulate, not the power to condemn. The statutory grant of the power of eminent domain must be indicated by express terms or by clear implication. The delegation of police power [to the agency] was neither an express grant of condemnation power nor one by implication.

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 n.7 (9th Cir. 1977) (internal citations omitted), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979). Some lower federal courts have held, that "grant of [eminent domain] power will never pass by implication." *City of Thibodaux v. Louisiana Power & Light Co.*, 153 F. Supp. 515, 517 (E.D. La. 1957) (J. Skelly Wright), *rev'd on other grounds*, 255 F.2d 774 (5th Cir. 1958), *rev'd*, 360 U.S. 25 (1959), and cases cited therein. *See also United States v. 67.59 Acres of Land*, 415 F. Supp. 544 (M.D. Pa. 1976).

B. The Eleventh Circuit Decision Can Be Affirmed On Statutory Grounds Alone

Based upon the foregoing, we submit that this case does not present a proper forum for deciding the constitutional issues raised by appellants in their briefs. The "taking" finding which forms the heart of the Eleventh Circuit decision was based upon agency conduct, not the Pole Attachment Act. It is a cardinal principle of law that important constitutional questions should not be decided in the absence of a need to make such a decision.[33] In this regard, statutes or regulations should not be invalidated on constitutional grounds if "a construction of the statute is fairly possible by which the question may be avoided." [34]

The parties to this proceeding have actually urged that such a construction is possible if this Court agrees that Congress, in enacting the Pole Attachment Act, intended an extremely limited delegation of authority. Therefore,

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[33] *See County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979), in which this Court observed:

> Federal Courts are courts of limited jurisdiction. They have the authority to adjudicate specific controversies between adverse litigants over which and over whom they have jurisdiction. In the exercise of that authority, they have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration."

See also Mills v. Rogers, 457 U.S. 291, 305 (1982) ("It is this Court's settled policy to avoid unnecessary decisions of constitutional issues. . . .")

[34] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring, *quoting Crowell v. Benson*, 285 U.S. 22, 62 (1932). *See also Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here.")

the constitutionality of the Pole Attachment Act itself is not really at issue. Rather, the Eleventh Circuit's finding that the FCC's actions with respect to Florida Power's poles encroached too far on Florida Power's property rights must be reviewed in the context of whether such conduct fell within the narrow authority delegated by Congress. The factual predicate for the Eleventh Circuit's decision is quite different than the FCC's description of proper conduct under the Pole Attachment Act, and the very narrow jurisdiction granted in the Pole Attachment Act is at significant variance with the specific facts of this particular proceeding. The conduct of the FCC at issue here cannot be reconciled with the limited authority granted under the Pole Attachment Act [35] and, thus the constitutional issues urged by the parties need not and should not be reached.[36]

C. The Constitutional Implications Of The Compensation Provisions Of The Pole Attachment Act Need Not Be Examined Because The Act Does Not Authorize The FCC To Take Private Property

It is, of course, true that the Eleventh Circuit invalidated the procedure established by the Pole Attachment Act as a vehicle for setting "just compensation" for the taking of Florida Power's property.[37] But the Eleventh Circuit ruled only that the compensation scheme set forth in the Act failed to pass constitutional muster *because* the FCC had utilized this procedure in an actual taking

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[35] It is well settled that the FCC must operate within the confines of the jurisdiction delegated to it by Congress. *See Louisiana Public Service Commission v. FCC*, —— U.S. ——, 54 U.S.L.W. 4505, 4511 (1986).

[36] This is not to say that the Eleventh Circuit's constitutional conclusions were erroneous. But in this particular case, the judgment of the Eleventh Circuit can be affirmed without reaching the constitutional issues.

[37] *Florida Power Corp.*, 772 F.2d at 1544-46.

context.[38] The Eleventh Circuit expressly declined to rule on whether the FCC's actions could have been sustained had the FCC acted within the limits of the Pole Attachment Act.[39]

Thus, the question of how Congress might grant the FCC the authority to set "just compensation" should it grant the FCC the power to "take" private property, or how the FCC could properly perform this adjudicatory function, is not at issue here. Nor, for that matter, is the type of "formula" which could pass constitutional or statutory review in a non-taking context. The FCC does not have the power to "take" pursuant to the Pole Attachment Act, and, as noted, expressly disclaims such author-

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[38] Both appellants contend that the recovery of "fully allocated costs" under the Pole Attachment Act provides Florida Power with just and reasonable pole attachment rates. Group W Brief at 10. FCC Brief at 22. Assuming that there has been a taking in this case, appellants' position incorrectly assumes that the "fully allocated costs" of Florida Power's poles provides Florida Power with just compensation, under the Fifth Amendment, for the taking of its poles by appellants. A court, in determining just compensation for a taking, must look to the full and perfect equivalent in money of the property taken, whereby the owner is placed in as good a financial position as he would have been in had the property not been taken. Such a determination may not lawfully be restricted to a "fully allocated costs" methodology. *See United States v. Miller*, 317 U.S. 369 (1943).

[39] *Florida Power Corp.*, 772 F.2d at 1546-47, n.6. It should be noted that the "formula" which the FCC utilized to set the rates which replaced the Florida Power contract rates has been invalidated by two other circuit courts. *See Texas Power & Light Co. v. Federal Communications Com'n*, 784 F.2d 1265 (5th Cir. 1986); *Alabama Power Co. v. Federal Communications Com'n*, 773 F.2d 362 (D.C. Cir. 1985). The FCC is now conducting a rulemaking to develop a new formula. *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, FCC 86-274 (released June 6, 1986). While not dispositive, we submit that the existence of this ongoing proceeding is likewise inconsistent with the FCC's position here that the Eleventh Circuit invalidated the entire Pole Attachment Act.

ity. Accordingly, if the Eleventh Circuit's decision that the FCC "took" Florida Power's property is correct, this "taking" was *ultra vires* in and of itself. Just compensation issues need not be reached because the question of just compensation only arises if the FCC has "taking" authority in the first instance. As the FCC's invalidation of the contracts of Florida Power exceeded its statutory jurisdiction, affirmance of the Eleventh Circuit's judgment in this regard should permit Florida Power to enforce its lawful contracts without implicating the constitutional rights of any party.

II. THE CONSTITUTION PROTECTS THE PROPERTY OF REGULATED UTILITIES FROM UNCOMPENSATED TAKINGS BY THE FEDERAL GOVERNMENT

Should this Court decide to address the constitutional issues raised by appellants, it then becomes important to focus on a key error in their constitutional analysis. Appellants' position is based in large part upon the assertion (express or implied) that the property of public utility companies is entitled to less constitutional protection against governmental takings than is the property of other companies. This notion is without legal or constitutional foundation. While the services which public utilities provide can be (and often are) subject to extensive governmental regulation, the property of such utilities remains under private ownership. As regulated utilities, MTN, NWB and PNB are not in the "business" of providing pole space to the general public. Rather, they provide telecommunication services to the public—and utility poles are private facilities utilized to facilitate the provision of those services.

As appellants note, when private property is devoted to public use it is subject to public regulation.[40] When

[40] *Munn v. Illinois*, 94 U.S. 113, 130 (1876). Note, however, the observation of Justice Brandeis that: "The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise." *State of Missouri v. Public Service Commission*, 262 U.S. 276, 290 (1923) (Brandeis, J. dissenting from opinion but concurring in result).

such regulation involves the setting of rates for services, the utility is constitutionally entitled to a rate which enables it to earn a reasonable rate of return on the value of the property used to provide the utility services in question.[41] But this governmental ability to regulate rates for service has never been equated with a right to take utility property, or to regulate utility property in a manner which is equivalent to a taking. As this Court observed in *State of Missouri v. Public Service Commission*:[42]

> It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership.

This recognition of the basic property rights of utilities was similarly affirmed in *Board of Public Utility Com'rs. v. New York Telephone Co.*[43] in which this Court rejected the proposition that rate payers obtained property rights in utility property:

> Customers pay for services, not for the property used to render it . . . By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.[44]

[41] *See Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938); *Bluefield Waterworks & I. Co. v. Public Service Commission*, 262 U.S. 679, 692-3 (1923).

[42] *State of Missouri v. Public Service Comm'n, supra*, 262 U.S. 276, 289.

[43] 271 U.S. 23 (1926).

[44] *Id.* at 32.

The principle that utility private property rights do not labor under a diminished standard of constitutional protection was recently re-emphasized in two cases involving the First and Fifth Amendment rights of utilities. In *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980), this Court noted that the utility was using "its own billing envelopes to promulgate its views on controversial issues of public policy" and therefore invalidated the Public Service Commission's prohibition on utility company inserts. In *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, —— U.S. ——, 106 S. Ct. 903 (1986), this Court affirmed a utility's right to exclude the distribution of the viewpoints of others from its privately owned billing envelopes.[45] These decisions reaffirmed that public utilities enjoy the same First and Fifth Amendment rights as other businesses, and are inconsistent with the FCC's and Group W's assertion that the property rights of utilities enjoy only "second class" constitutional protection against a governmental taking.

In a similar vein, both the FCC and Group W assert that the *sine qua non* of a taking when utility property is involved is whether the "rates established are not confiscatory."[46] This position confuses two quite different

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[45] *See* plurality opinion, 106 S. Ct. at 912 ("The envelopes themselves, the bills, and '*Progress*' all remain appellant's property. The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees.") (emphasis in original); Justice Marshall, 106 S. Ct. at 915, n.1 ("Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has 'paid' for the property by paying utility bills.")

[46] FCC Brief at 9-10; Group W Brief at 20. Group W makes the argument that the "taking" issue might depend on whether the property taken could be defined as a "bottleneck facility." Group W Brief at 22, n.51. While the existence of a "bottleneck facility" might be cause for rate regulation in some instances, such a situation clearly would not justify an uncompensated taking.

principles. The establishment of a confiscatory rate is itself a constitutional violation by the regulatory authority —i.e., an uncompensated taking. Thus, confiscatory ratemaking generally would fall within the constitutional parameters of regulation that "goes too far."[47] But an actual taking of property—as opposed to the overly zealous regulation of the use of property—is a different matter, and the private property of utilities share the basic constitutional protection against uncompensated takings to the full extent that such protection applies to all other owners of private property.[48] Thus, the government's responsibilities under the Constitution are quite different when it takes private property than when it regulates the use of such property.[49] This essential distinction was summarized in *West v. Chesapeake & Potomac Telephone Co.*,[50] as follows:

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[47] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also MacDonald, Sommer & Frates v. Yolo County*, —— U.S. ——, 106 S. Ct. 2561, 2566 (1986).

[48] Group W presents a different version of this taking theory—namely, that no taking occurs upon government appropriation of regulated telephone utility property because the utility can recoup the loss from ratepayers through higher rates for local telephone service. Group W Brief at 7, 23. *See also* FCC Brief at 11. This approach is not accurate as a factual matter—losses from below value pole attachment rates for CATV companies are not automatically recouped by telephone companies, either in the short or long term. Furthermore, in the context of a physical invasion of property such as occurred here, Group W's legal proposition is erroneous—there is no support for the notion that the government may take utility private property without just compensation simply because the utility might be able to recoup some of the loss through increased charges to others who purchase services provided through the remaining property.

[49] The FCC does at times implicitly recognize this distinction. For example, the FCC concedes that:

> Because Congress was establishing a rate regulation system, not providing for the taking of property, it did not expressly provide that the 'just and reasonable rate' should constitute the nature of just compensation. FCC Brief at 21.

[50] 295 U.S. 662 (1935).

> The established principle is that as the due process clauses (Amendments 5 and 14) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation. When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value.[51]

It is the failure to recognize this fundamental difference which leads appellants to derive the erroneous notion that utility property is not fully protected under the Constitution from caselaw discussing the parameters of service regulation.

Group W makes a similar argument that a utility which enters into a contract invariably does so with the foreknowledge that the other party to the contract may be able to avoid paying the contract rate.[52] This position likewise reflects a failure to grasp the distinction between legitimate regulation of services and taking of property. The contracts invalidated by the FCC in this proceeding were not for common carrier services (or for interconnection with common carrier services). They instead were for physical occupancy of private property in a manner which, by its very nature (due to physical limitations of utility poles) excluded other uses of the occupied space. When a utility sells or leases its private property under these conditions, there is no legal precedent for the proposition that it can reasonably anticipate that its contract is not binding—and the cases cited by Group W, which deal with contracts for carrier services are not to the contrary.[53]

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[51] *Id.* at 671.

[52] Group W Brief at 28-30.

[53] Group W Brief at 28-29, n.65. The lead case relied upon by Group W for this proposition, *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109 (1937), in context, supports the distinction we draw here. The passage from *Midland* quoted by Group W continues as follows:

> But the State has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them. *Id.* at 113 (footnotes omitted).

Midland simply reaffirms basic principles of carrier *service* regulation. It does not support the proposition that a utility's contracts for use of its facilities are presumptively subject to reversal by a regulator.

Finally, the FCC seems to argue that there would be no taking of utility property even if utility owners of poles could not evict CATV companies, likening this proceeding to rent control statutes which restrict the eviction of tenants.[54] The FCC predicates this argument on *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983). In *Fresh Pond*, this Court dismissed an appeal of a decision of the Supreme Judicial Court of Massachusetts. The entire opinion of the eight justice majority reads:

> The appeal is dismissed for want of a substantial federal question.[55]

The entire opinion of the Massachusetts Supreme Court below reads:

> The judgment of the Superior Court is affirmed by an equally divided court. Justice Wilkins took no part in the decision of the case. He is a member of the Board of Overseers of Harvard College which may have an interest in the disposition of issues raised in this case.[56]

The lower Massachusetts Court decision has not been published.

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[54] FCC Brief at 19-20.

[55] *Fresh Pond, supra*, 106 S.Ct. at 218.

[56] *Fresh Pond Shopping Center, Inc. v. Rent Control Board of Cambridge*, 446 N.E.2d 1060 (Mass. 1983).

While Justice Rehnquist issued an opinion in dissent to the dismissal of the appeal when it was before this Court, we submit that *Fresh Pond*, a case without any published majority (or plurality) opinion at any level, cannot control the sensitive constitutional issues raised by appellants. It certainly cannot be assumed that "eight Members of the Court" [57] reached any specific conclusions about these constitutional issues, as is asserted.

CONCLUSION

For the foregoing reasons, MTN, NWB and PNB submit that the Eleventh Circuit's decision reversing the FCC Order under Review should be affirmed.

Respectfully submitted,

L. ANDREW TOLLIN *
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141

DANA A. RASMUSSEN
ROBERT B. MCKENNA
BRUCE K. POSEY
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 429-0303

Attorneys for
The Mountain States Telephone and Telegraph Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company

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* Counsel of Record

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[57] FCC Brief at 20.